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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

# No. 700

F. S. GAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.

*Appellees.*

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

## STATEMENT AS TO JURISDICTION ON APPEAL

F. S. Gambrell and Jack Gambrell, the above named Appellants, submit this Statement in accordance with Rule 12 of the Rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review this cause on appeal from the final judgment entered herein by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sustaining an ordinance of the City of Austin and an Act of the Legislature of the State of Texas as applied to them, challenged as being repugnant to the due process clause of the Fourteenth Amendment to the

Constitution of the United States, as hereinafter more fully pointed out.[1]

## I

### Statutory Provisions Sustaining Jurisdiction

1. This Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended (U.S.C.A. Title 28, Sec. 344(a)), which provides that,

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error . . ."

The decision complained of here sustains the validity of a State statute and also the validity of a city ordinance. *Jamison* v. *State of Texas* (Tex. 1943), 318 U. S. 413, treats a city ordinance just as though it were a State statute within the meaning of U.S.C.A. Title 28, Section 344a, *supra*.

2. Pursuant to the Act of January 31, 1928 (45 Stat. 54; U.S.C.A. Title 28, Sec. 861(a)), as amended by the Act of April 26, 1928 (45 Stat. 455; U.S.C.A. Title 28, Sec. 861 (b)), the present appeal is brought in lieu of a writ of error.

## II

### Statute of the State, the Validity of Which Is Involved

(a) The Statute of Texas (Ch. 84, p. 257, General Laws, 5th Called Session, 41st Legislature, 1935, being Vernon's

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[1] The opinion of the State court (copied as Appendix "A" hereto) expressly shows that these Federal questions were raised and were duly considered and decided by the court.

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Civil Statutes of Texas, Article 4646(a)), the validity of which is herein involved, as applied to the Appellants under the facts of this case is, in so far as relevant, as follows:

> "No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city."

The ordinance of the City of Austin, the validity of which is herein involved, is, in so far as relevant, as follows:

> "An Ordinance Vacating the Subdivision Known As 'Northfield Annex No. 2' and Also Vacating All Streets, Avenues, Alleys, Utility Easements and Other Public Places In Said Subdivision, and Declaring An Emergency.
>
> "Be It Ordained By the City Council of the City of Austin:
>
> "*Section 1.* The plat of the subdivision known as 'Northfield Annex No. 2,' as recorded in Book 4, at page 135, of the Plat Records, Travis County, Texas, be and the same is hereby vacated so that the same shall hereafter have no force or effect as a subdivision of the property constituting said subdivision, as shown by the Plat.
>
> "*Section 2.* All streets, avenues, alleys, utility easements and other public places within said 'Northfield Annex No. 2' Subdivision are hereby vacated, abandoned and closed."

## III

### Date of Judgment and Date of Presentation of Application for Appeal

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas sought to be here reviewed was entered on October 8, 1947. Appellants' motion for rehearing was filed within fifteen days, as authorized by Rule 458, Texas Rules of Practice and Procedure in Civil Actions. The motion was entertained and overruled on October 29, 1947. Thereupon, within the time limited by law (Articles 1728 and 1729, Revised Civil Statutes of Texas 1925, and Rule 468, Texas Rules of Practice and Procedure in Civil Actions), Appellants petitioned the Supreme Court of Texas to grant the writ of error and review the case. The petition was refused by the Supreme Court on January 7, 1948.

Appellants thereupon, within fifteen days as is authorized by Rule 515, Texas Rules of Practice and Procedure in Civil Actions, filed their motion for rehearing of the application for writ of error. This motion for rehearing was entertained by the Supreme Court of Texas and was overruled on February 4, 1948; whereupon the judgment of the Court of Civil Appeals here sought to be reviewed became final under the State law.[2]

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[2] When a petition for writ of error is filed, the petition and the original record are forwarded by the Clerk of the Court of Civil Appeals to the Clerk of the Supreme Court. (See Rules 472 and 473, Texas Rules of Practice and Procedure in Civil Actions.) The record is retained in the Supreme Court for fifteen days after the petition is refused awaiting the filing of a motion for rehearing, and then until the court has overruled any such motion that may be filed. It is then returned to the Court of Civil Appeals. (See Rule 484, Texas Rules of Practice and Procedure in Civil Actions.) True Copies of the court rules here referred to are here appended as Appendix "B."

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The Court of Civil Appeals has possession of the record and is the "highest court of the State in which a decision in the suit could be had."

The following are samples of cases brought here from Courts of Civil Appeals in Texas:

*T. & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 113;

*St. Louis S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156;

*S. A. & A. P. R. Co.* v. *Wagner*, 241 U. S. 476;

*Zucht* v. *King*, 260 U. S. 174;

*Lone Star Gas Co.* v. *State of Texas*, 304 U. S. 224.

2. The date on which this Application for Appeal is presented is February 21, 1948.

## IV

**The Nature of the Case and of the Rulings of the State Court Bringing This Case Within the Jurisdiction of This Court.**

Under this heading will also be shown when and how the Federal questions sought to be reviewed were raised; the method of raising them, and the way in which they were passed upon by the State court as required by Amended Rule 12.

### Nature of the Case

In this suit Appellants challenge on grounds arising under the Federal Constitution as construed by the State courts and applied to them, (1) an Act of the Texas Legislature, and (2) an ordinance of the City of Austin, both copied under heading II.

This action was brought by the Appellants F. S. Gambrell and Jack Gambrell against Chalk Hill Theatre Company, Ltd., Walter Staehely and the City of Austin for an

injunction enjoining Staehely from giving effect to and from enforcing the terms of an instrument which he executed February 28, 1946 and filed in the office of the County Clerk of Travis County on March 21, 1946, revoking a subdivision known as Northfield Annex No. 2 previously made by him and recorded on August 6, 1940; and for an injunction enjoining the city from giving effect to and from enforcing the terms of an ordinance adopted by it on February 28, 1946, vacating the subdivision known as Northfield Annex No. 2; and enjoining the company from physically closing any of the streets or alleys within such subdivision or from interfering with Appellants' use thereof.

In the trial court the Appellants urged that the attempted revocation of the subdivision by Staehely on February 28, 1946, the ordinance of the city of February 28, 1946, purporting to vacate the subdivision, and the physical closing of any of the streets or alleys within such subdivision without compensation to Appellants, amounted to taking of their property (their private easement in the streets, alleys, etc.) without due process of law.

The Appellees contended that the City of Austin had exclusive control over the streets and alleys within the city, and the ordinance purporting to vacate and close the streets and alleys was therefore valid. They further contended that Chapter 84, page 257, General Laws, 5th Called Session 41st Legislature, Acts 1930, being Vernon's Civil Statutes of Texas, Article 4646a, in any event prevented the issuance of an injunction as prayed for by Appellants.

In the State courts Appellants urged, first, that the ordinance should be so construed as to close and vacate only the *public easement* and *not* the private easement; and secondly, if said ordinance was not so construed it violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the Appellants of their property (private

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easement in said streets, alleys, etc.) without due process of law, in this,—that it takes their private easement without compensation.

As to Chapter 84, page 257, General Laws aforesaid, in the State courts Appellants urged, first, that the Act should be so construed as to prevent an injunction only in so far as the public easement in the street is concerned; and secondly, if said Act was not so construed it violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the Appellants of their property (their private easement in the streets, alleys, etc.) without due process of law.

The grounds of attack duly pleaded in the court of first instance are that the ordinance and the Act, if construed and applied to prevent them from protecting their private easement by injunction, deprives them of their property without due process of law.

The trial court, the Court of Civil Appeals and the Supreme Court of Texas sustained the Appellees' (defendants') contentions and overruled the contentions of the Appellants (plaintiffs). Judgment in the trial court was against the Appellants, denying the injunction in whole; judgment in the Court of Civil Appeals was an affirmance of the trial court's judgment; and the Supreme Court of Texas by refusing to review the case on writ of error sustained the trial court and the Court of Civil Appeals. The court's opinion was not based upon any non-Federal ground.

### Rulings of the State Court

The court of first instance, being one of the District Courts of Travis County, denied plaintiffs an injunction and thereby upheld as valid (1) the February 28, 1946 instrument revoking the subdivision known as Northfield Annex 2; (2) the February 28, 1946 ordinance of the City of

Austin vacating the subdivision and closing the streets and alleys thereof; and (3) the Act of the company in physically closing the streets. The Appellants had by their original petition filed in the trial court challenged the entire procedure, separately and collectively, as being in violation of the due process clause of the Constitution, in that if given effect the property (private easement) of Appellants would be taken without compensation and without due process of law. The trial court overruled Appellants' contentions and, as above stated, entered judgment for Appellees.

The Court of Civil Appeals, being the intermediate appellate court, affirmed the judgment of the trial court. In so doing the Court of Civil Appeals held that Appellants had acquired vested rights in the streets and alleys in the subdivision from Staehely, their grantor, and that these rights were as to him irrevocable and that his attempted revocation was without legal effect. However, the court held that the city ordinance "accomplished the same purpose as the attempted revocation by Staehely" and was valid.

The Federal question sought to be reviewed was raised in the Court of Civil Appeals by an assignment of error, as well as by the original petition in the trial court. The Court of Civil Appeals held in effect that the city ordinance effectually vacated and closed the streets and alleys in question, and denied Appellants an injunction to prevent such closing, thereby holding that the city could take Appellants' vested property rights (their private easement in the streets and alleys) by the mere enactment of such ordinance and without compensation.

We quote in part from the opinion of the Court of Civil Appeals:

> "There is no doubt but that a valid dedication of the streets shown on the 1940 plat of Northfield Annex

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No. 2 was made by appellee Staehely. Nor is there any doubt but that appellants, by purchasing a lot or lots within the subdivision, and with reference to its map or plat, have acquired vested rights in the streets and alleys shown thereon. City of Corsicana *v.* Anderson, 33 Tex. Civ. App. 596, 78 S. W. 261 writ refused.

"We also have no doubt but that the 1940 dedication by appellee Staehely became irrevocable, in so far as he is concerned, after the conveyance of Lot 15, as above shown. McLennan County *v.* Taylor, Tex Civ. App., 96 S. W. 2d 997, writ dismissed.

"It follows that the attempted revocation of the 1940 dedication by appellee Staehely was without legal effect.

"The ordinance adopted by the City February 28, 1946, vacating the subdivision known as Northfield Annex No. 2, accomplished the same purpose as the attempted revocation by Staehely. • • •

• • • • • • • •

"In this case damages are neither sought nor alleged. Appellant did allege that:

'(a) To close and vacate sale streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law.

'(b) The revocation of the subdivision by appellee Staehely "has cast upon the title of the property owned by plaintiffs a cloud which is in effect a taking of plaintiffs' property without due process of law."

'(c) Any damages which plaintiffs might be entitled to receive against any one or more of the defendants named herein would be uncertain and indefinite in amount, incapable of definite ascertainment.'

"We have already held the revocation of the subdivision by appellee Steahely to be void.

"Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants'

property under Art. 1, Sec. 17 of our Constitution, Vernon's Ann. St. is shown as there is no physical invasion or appropriation of appellants' property.

• • • • • • •

"We are further of the opinion that Art. 4646a, Vernon's Ann. Civ. St., precludes appellants from obtaining injunctive relief against enforcement of the ordinance or resubdivision of 1946. This Article provides: 'No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city.'

• • • • • • •

"The constitutionality of Art. 4646a was sustained in Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. 2nd 595."

In other words, the opinion of the Court of Civil Appeals shows that Appellants urged that as applied to them and as construed by the court, the ordinance and Chapter 84, page 257, General Laws aforesaid, were unconstitutional in that action of the Appellees thereunder is in effect the taking of Appellants' property without due process of law.

In their motion for rehearing in the Court of Civil Appeals, which was overruled on October 29, 1947, the Appellants by an assignment of error again urged that the ordinance and the Act of the Legislature as construed and applied against them constituted a taking of their property without due process of law.

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In due time, as permitted by State law, Appellants filed their petition for writ of error asking the Supreme Court of Texas to review the judgment of the Court of Civil Appeals, which petition was refused on January 7, 1948. Thereafter, and within the time permitted by State law, appellants filed their motion for rehearing in the Supreme Court and said motion was overruled on February 4, 1948.

The Appellants assigned as error in the Supreme Court the following grounds:

> "I. Petitioner had, by virtue of his purchase of Lot 15, Block 1, Northfield Annex No. 2 Addition, with specific reference to and reliance upon the deed of dedication and map, a *private easement* over all streets in the Addition. A private easement is an interest in land. Injunction is the proper remedy to protect his interest in land. To deny Petitioner an injunction is to violate Article 1, Sections 17 and 19, Constitution of Texas, and the Fourteenth Amendment to the Constitution of the United States, in that Petitioner is deprived of his property without due process of law. The Court of Civil Appeals erred in failing to so hold, and this Honorable Court erred in denying Petitioners' Application.
>
> "II. Article 4646a V.A.C.S. does not deny Petitioner the right to injunction to protect a private easement. If it is to be so construed, then it is invalid because contrary to Article 1, Sections 17 and 19, Constitution of Texas, and the Fourteenth Amendment to the Constitution of the United States. The Court of Civil Appeals erred in failing to so hold, and this Honorable Court has erred in denying Petitioners' Application for Writ of Error."

By refusing to review the case the Supreme Court of Texas held, as did the Court of Civil Appeals and the trial court, that Appellants could be deprived of an interest in land (a private easement over the streets and alleys) by the

mere enactment of an ordinance by a city and without compensating the Appellants, and that Appellants were not entitled to an injunction to protect their interest in land.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are: *Miller* v. *Schoene* (Va. 1928), 276 U. S. 272, holding that where a state statute was challenged in state court under the due process clause, the case was properly within the jurisdiction of the Supreme Court of the United States; and *Jamison* v. *State of Texas* (Tex. 1943), 318 U. S. 413, holding that a city ordinance prohibiting distribution of hand-bills on streets was a "statute" within subsection (a) of Section 344a, United States Code.

## V

### The Questions Involved Are Substantial

The decisions in the instant case of the State courts are in conflict with previous decisions of the Supreme Court of the United States. One such case is *Panhandle Eastern Pipeline Co.* v. *State Highway Commission of Kansas*, 294 U. S. 613, wherein this court considered an order of the State Highway Commission of Kansas requiring the company to make specified changes in its transmission lines located on its own rights-of-way to determine whether or not such an order was in violation of the Fourteenth Amendment to the Constitution of the United States. We quote from the opinion:

> "If carried into effect, the challenged order of the commission would result in taking private property for public use. State of Washington ex rel. Oregon R. & Nav. Co. *v.* Fairchild, 224 U. S. 510, 523, 524, 32 S. Ct. 535, 56 L. Ed. 863; Southern Ry. Co. *v.* Virginia, 290 U. S. 190, 194, 54 S. Ct. 148, 78 L. Ed. 260. A private right of way is an easement and is land. United States *v.* Welch, 217 U. S. 333, 339, 30 S. Ct.

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527, 54 L. Ed. 787, 28 L.R.A. (N.S.) 385, 19 Ann. Cas. 680. No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the Fourteenth Amendment. Chicago, B. & Q. Ry. Co. *v.* Chicago, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. Ed. 979; Chicago B. & Q. Com'rs, 200 U. S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; McCoy *v.* Union Elevated Ry. Co., 247 U. S. 354, 363, 38 S. Ct. 504, 62 L. Ed. 1156; Chicago, B. & Q. R. Co. *v.* Pub. Util. Comm., 69 Colo. 275, 279, 193 P. 726. See Lewis Eminent Domain (3rd Ed.) sec. 223.

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. Schlesinger *v.* Wisconsin, 270 U. S. 230, 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A. L. R. 1224; Georgia Power Co. *v.* Decatur, 281 U. S. 505, 508, 50 S. Ct. 369, 74 L. Ed. 999; Southern Railway Co. *v.* Virginia, supra, page 196 of 290 U. S., 54 S. Ct. 148."

The foregoing was a case where the Highway Commission had secured a right of way for the purpose of relocating a state highway on land in which the pipe line company had theretofore secured an easement for its pipelines.

It is our view that just as Mr. Justice McReynolds said in that case, we in our case have "a private right of way (which) is an easement and is land." Nor do we believe that this Honorable Court will sanction a decision by the Court of Civil Appeals in the instant case which disregards constitutional inhibitions under the guise that the city is acting under the police power. We quote further from the opinion:

"The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it

there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."

* * * * * * *

"As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the state highway commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution."

As heretofore pointed out, the Court of Civil Appeals in the instant case held that Appellants had "acquired vested rights in the streets and alleys" in the subdivision; that such rights were "irrevocable" and that "the attempted revocation of the 1940 dedication by Appellee Staehely was without legal effect."

As we shall hereafter show, the holding of the Court of Civil Appeals down to this point was in keeping not only with the decisions of the Supreme Court of the United States but with the decisions of the Supreme Court of Texas. But after making the above holding, the Court of Civil Appeals held that "the ordinance adopted by the city February 28, 1946 vacating the subdivision known as Northfield Annex 2, accomplished the same purpose as the attempted revocation by Staehely"; and further held that such ordinance was valid. It is this last holding which is in direct and irreconcilable conflict with the decision of the Supreme Court of the United States from which we heretofore quoted.

That the questions involved are substantial is further shown by the fact that the instant case is in conflict with previous decisions of the Supreme Court of Texas. These we shall discuss briefly.

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When Respondent Staehely sold Lot 15, Block 1, Northfield Annex No. 2 to Petitioner Gambrell, by the deed of conveyance Gambrell took title to the lot, and in addition thereto to the middle of the street upon which the lot abuts, subject to the right of the public to the use thereof. *Texas Bitulithic Co.* v. *Warwick* (Comm. App.) 293 S. W. 160.

In addition to the foregoing, by such deed Petitioner acquired "an easement in the land designated as a street" with "the right to have such street or alley kept open, *whether the public has or not accepted the dedication by some acts of user.*" *Wolf* v. *Brass,* 72 Tex. 133, 12 S. W. 159.

An easement is "an interest in land." *Settegast* v. *Foley Bros. Dry Goods Co.,* (Comm. App.) 270 S. W. 1014, 1016.

An easement "always implies an interest in land in or over which it is to be enjoyed." *Coughran* v. *Nunez,* (Comm. App.) 127 S. W. (2d) 885, 888.

"Interference with such easement will be protected by injunction." *Standard Oil & Gas Co.* v. *Wimberly,* 181 S. W. (2d) 944.

In the recent case of *Latimer* v. *Hess,* 183 S. W. (2d) 996, the court held that "an easement is an interest in land," and that a mandatory injunction was the proper remedy for one having such an easement to require the removal of obstructions from an alley.

"An easement in land is an interest in land—an incorporeal hereditament." *Clements et al* v. *Taylor et al,* 184 S. W. (2d) 485.

In the case of *Gillett* v. *Van Horne* by the El Paso Court of Civil Appeals, 36 S. W. (2d) 305, writ dismissed, the court, after first holding that trespass to try title was not

the remedy to establish or prevent the obstruction of an easement, said:

> "• • • but it is well settled that due enjoyment of an easement will be protected by injunction against encroachments or obstructions."

In *Texas & P. Ry. Co.* v. *City of El Paso* (Sup.) 85 S. W. (2d) 245, 249, Associate Justice Sharp in a case involving a question of taxation, said:

> "An easement is essentially an interest in land."

Justice Funderburk, in *Burgess* v. *City and County of Dallas Levee Imp. Dist.*, 155 S. W. (2d) 402, 405, writ refused for want of merit, said:

> "An easement in land is an interest in land and therefore is land."

Stated in another way, the courts have held that "an easement is defined as 'a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor.'" *Henslee* v. *Boyd*, 107 S. W. 128, 129; *Callan* v. *Walters*, 190 S. W. 829, 830; *West* v. *Giesen*, 242 S. W. 312, 319; *Magnolia Petroleum Co.* v. *Caswell*, 1 S. W. (2d) 597, 600.

In *Oswald* v. *Grenet*, 22 Tex. 94, the action was for injunction. The Supreme Court vouchsafed this remedy, saying:

> "• • • and the purchasers of lots have a right to have the streets thrown open forever, and this principle is not limited in its application to the single street on which the lots of the purchaser are situated."

The Supreme Court of Texas refused to review the case of *Eidelbach* v. *Davis*, 99 S. W. (2d) 1067. In that case the Court of Civil Appeals said:

> "It is a well settled rule in Texas that the two classes of easements, the one inuring to the public in general by the filing of the plat and dedication, and

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the other inuring to lot purchasers by reason of their contract, are separate and distinct rights which may coexist in contemporaneous and harmonious operation and one may be destroyed without necessary impairment of the other. *That is to say, the proper public authority may vacate and close or relinquish the public easement without impairing any private or contractual rights which may exist in the easements affected.*" (P. 1072)

In *Amerman* v. *Missouri, K. & T. Ry. Co. of Texas,* 182 S. W. 54 (writ refused by Supreme Court), the Court of Civil Appeals in its opinion said:

> "The abandonment by the city of any rights it may have had in said street in no way affected the existence of the street. The rights of all persons owning property abutting thereon or adjacent thereto, *and who held under conveyances referring to and calling for said street to keep the street open was not dependent upon whether the public accepted the dedication or abandoned its rights thereto.* Oswald *v.* Grenet, 22 Tex. 94; Wolf *v.* Brass, 72 Tex. 133, 12 S. W. 159."

Many other cases so holding could be cited and quoted from but they would be merely cumulative of the decisions we have cited and quoted from above.

## VI

### Opinion Appended

Copy of the opinion of the Court of Civil Appeals (unofficially reported 205 S. W. (2d) 126) is attached as Appendix "A."

Dated this 20 day of February, 1948.

F. S. Gambrell,
Jack Gambrell,
By Everett L. Looney,
*712 Brown Building,*
*Austin, Texas,*
*Their Attorney.*

## APPENDIX "A"

No. 9647

F. S. GAMBRELL ET AL., *Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL., *Appellees*

From the District Court of Travis County

F. S. Gambrell and Jack Gambrell, appellants, sued Chalk Hill Theatre Company, Ltd., hereinafter called "Company," Walter Staehely and the City of Austin, hereinafter called "City", appellees, for an injunction enjoining Staehely from giving effect to and from enforcing the terms of an instrument which he executed February 28, 1946, and filed in the office of the County Clerk of Travis County, March 21, 1946, revoking a subdivision, known as Northfield Annex No. 2, previously made by him and recorded on August 6, 1940; and for an injunction enjoining the City from giving effect to and from enforcing the terms of an ordinance adopted by it February 28, 1946, vacating the subdivision known as "Northfield Annex No. 2"; and enjoining the Company from physically closing any of the streets or alleys within such subdivision, or from interfering with appellants' use thereof.

The recovery of damages was not sought.

Separate so-called pleas in abatement were filed by appellees, all of similar import, alleging, under oath, that appellants were not the owners or lessees of any real property actually abutting on any part of any street vacated, abandoned or closed by Staehely or the City, and that an action for injunction would not lie, appellants being relegated to an action at law for damages.

Upon hearing the court sustained these pleas and, appellants declining to amend, dismissed the suit; hence this appeal.

The facts are undisputed except as to an allegation on the part of appellants that the ordinance adopted by the City was enacted for the sole and only purpose of accommo-

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dating the Company which desired to construct a drive-in theatre which would encroach upon the streets and alleys which were closed and abandoned by such ordinance, and that such ordinance did not, as recited in it, serve to promote the health, safety and general welfare of the public, and that all appellees had actual knowledge of these facts.

On August 6, 1940, appellee Staehely, the owner of certain property in the northern portion of Austin, Texas, filed for record in the office of the County Clerk of Travis County, Texas, a plat styled "Northfield Annex Number Two." This dedication and plat was approved and accepted by the City Planning Board and the City Engineer on August 2, 1940, as required by Art. 974a, RCS. There appeared on this plat of Northfield Annex No. 2 a dedication by Staehely which reads, in part, as follows:

> "I do hereby dedicate and set apart for public use as streets, the streets shown thereon, as far as my interest may appear."

Thereafter, on January 22, 1946, appellant F. S. Gambrell purchased Lot No. 15 in Block 1 of Northfield Annex No. 2, and secured from Staehely a general warranty deed to this property. The purchase of this lot was made with specific reference to the plat and dedication filed in the office of the County Clerk of Travis County, Texas.

On February 15, 1946, appellant F. S. Gambrell contracted with appellee Staehely for the purchase of Lot 14, Block 1, Northfield Annex No. 2.

Thereafter, on February 28, 1946, appellee Staehely executed and filed for record in the office of the County Clerk of Travis County, Texas, an instrument whereby he sought to vacate and annul the streets, alleys, avenue, utility easements, and other public places within the Northfield Annex No. 2 Addition. On the same day the City Council of the City of Austin passed an ordinance whereby it purported to vacate and close all streets, avenues, alleys, utility easements and other public places within the Northfield Annex No. 2 Addition.

On March 6, 1946, appellee Staehely, representing himself as sole owner of the subdivision, filed a plat of record in

the office of the County Clerk of Travis County, Texas, styled "Northfield Annex Number Two." This new plat showed a changed course for Guadalupe Street with reference to its prior location on the first plat of record, and showed a complete abandonment and closing of portions of 55th, 55½ and 56th Streets in the Northfield Annex No. 2 Subdivision.

Appellants' Lots 14 and 15 front on Nelray Blvd. The east-west streets in this subdivision begin with Nelray Blvd. as the most southerly, 55th, then 55½ and 56th as the most northerly east-west street. Appellants' lots abut only on Nelray Blvd., which is not in any way altered by the resubdivision. 55th Street is shortened by 133.31 feet, 55½ Street by 230.18 feet, 56th Street by 230.04 feet. This is due to the easterly swing of Guadalupe Street as shown on the March 1946 plat of the resubdivision. On the original 1940 plat Guadalupe Street was straight, without curving to the east and the streets mentioned were hence of greater length.

There is no doubt but that a valid dedication of the streets shown on the 1940 plat of Northfield Annex No. 2 was made by appellee Staehely. Nor is there any doubt but that appellants, by purchasing a lot or lots within the subdivision, and with reference to its map or plat, have acquired vested rights in the streets and alleys shown thereon. City of Corsicana *v.* Anderson, 78 S. W. 261 (Ct. Civ. App. Writ Ref.).

We also have no doubt but that the 1940 dedication by appellee Staehely became irrevocable, insofar as he is concerned, after the conveyance of Lot 15, as above shown. McLennan Co. *v.* Taylor, 96 S. W. 2d 997 (Ct. Civ. App. Writ Dis.).

It follows that the attempted revocation of the 1940 dedication by appellee Staehely was without legal effect.

The ordinance adopted by the City February 28, 1946, vacating the subdivision known as Northfield Annex No. 2, accomplished the same purpose as the attempted revocation by Staehely. The ordinance recites, in the emergency clause, that the owners of Northfield Annex No. 2 desired

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to resubdivide the land in this addition in order to promote the health, safety and general welfare of the community.

Appellants deny the truth of the recitation in the emergency clause and say that the closing of such streets and alleys was part of a scheme by Staehely and the Company to make use of said subdivision as one tract, without streets and alleys, for their private gain and the private purpose of constructing an outdoor theatre thereon.

The issue, thus raised, has not been disposed of, and, if material, will, of necessity, require remand of this cause.

The City of Austin, as a Home Rule City, has plenary powers over its streets. Secs. 16, 17, 18, Art. 1175 VACS, Art. XIII, Sec. 1(i) City Charter of Austin; City of Dallas *v.* Ingram, 284 S. W. 345 (Ct. Civ. App. Writ Ref.); Duvall *v.* City of Dallas, 27 S. W. 2d 1105 (Ct. Civ. App. Writ Ref.).

Having this power, it is, nevertheless, well settled that a city may not, validly, abandon or close a street or alley in order to confer a private benefit or convenience. 39 Tex. Jur., pp. 534 and 535.

So, for the purpose of this opinion, we assume the truth of appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void.

Bearing in mind that damages are not sought, we must determine appellants' right to injunctive relief.

In Malott *v.* City of Brownsville, 298 S. W. 540 (Com. App., same case, 292 S. W. 606, 300 S. W. 29, and 4 S. W. 2d 965, appellant, as an abutting property owner and taxpayer, sued appellees to restrain the enforcement of an ordinance and to annul the same, which undertook to grant R. B. Creager, appellee, a franchise for the period of 50 years to occupy certain portions of Fourteenth Street and of Levee Street, in the City of Brownsville, and to construct, maintain, and operate on said parts of said streets piers, abutments, and other works necessary for the construction of the bridge and the landings and approaches thereto, and to construct and maintain thereon telegraph and telephone lines and toll houses and other structures necessary in the operation of said bridge, and restrain the defendants from closing or obstructing said portions of said streets.

The ordinance was alleged to be void for many reasons, including:

"* * * that it was further void because it was an attempt to take appellant's property for private use and purposes, without condemnation or paying adequate compensation therefor."

The Commission of Appeals held:

"It is unnecessary for us to pass upon the interesting question of the validity of the ordinance under which defendant in error Creager proposes to erect the structures complained of. If it be true, as found by the Court of Civil Appeals, that plaintiff in error has shown no probable injury from the threatened structures, then clearly he is in no event entitled to an injunction. The law is very clear on this point. An injunction will never be granted unless it appears that injury will otherwise result to the applicant. Chisholm *v.* Adams, 71 Texas 678, 10 S. W. 336. So that, if it be conceded the ordinance is void, nevertheless plaintiff in error must go further and show that he is threatened with an irreparable injury by its attempted enforcement before he can possibly be entitled to the relief sought. Pac. Express Co. *v.* Selbert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

"In Boise, etc., Co. *v.* Boise City, 213 U. S. 276, 29 S. Ct. 426, 53 L. Ed. 796, the object of the bill was to obtain an injunction against the enforcement of an ordinance of the city. The Supreme Court, in denying the relief sought, said:

" 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.'

"Authorities to this effect abound wherever the principles of equity are administered. Such courts will never do a useless thing, and the excuse for resorting

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to the principles of equity at all is to supply a remedy for the prevention of an injury or wrong for which the law affords no adequate remedy.

"To warrant a recovery in a case like this, it must appear that the complainant has suffered, or will suffer, some special damage. The fact that the ordinance is void, if it is void, is not sufficient ground for enjoining its enforcement. Other circumstances bringing the case under some recognized head of equity jurisdiction must be shown. 32 C. J., p. 265 Sec. 415."

Under this statement of the law, the court in the above case, held the proof of injury insufficient to warrant the issuance of an injunction.

In this case damages are neither sought nor alleged. Appellant did allege that:

(a) "To close and vacate sale streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law."

(b) The revocation of the subdivision by appellee Staehely "has cast upon the title of the property owned by plaintiffs a cloud which is in effect a taking of plaintiffs' property without due process of law."

(c) "Any damages which plaintiffs might be entitled to receive against any one or more of the defendants named herein would be uncertain and indefinite in amount, incapable of definite ascertainment * * *."

We have already held the revocation of the subdivision by appellee Staehely to be void.

Without repeating the undisputed facts as shown by this record, we hold that no "taking" of appellants' property, under Art. 1, Sec. 17, of our Constitution, is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, 27 S. W. 2d 1105 (Ct. Civ. App. Writ Ref.); Johnson *v.* Lancaster, 266 S. W. 565 (Ct. Civ. App.); Kahn *v.* City of Houston, 48 S. W. 2d 595 (Com. of App.).

Not only do appellants fail to allege any damage, general or special, they expressly decline to do so because the damages would be "incapable of definite ascertainment." It follows that the petition for injunction is not aided by the allegation that the ordinance is invalid.

We are further of the opinion that Art. 4646a, VACS, precludes appellants from obtaining injunctive relief against enforcement of the ordinance or resubdivision of 1946. This Article provides:

> "No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city."

Standing alone, the ordinance passed by the City vacating the subdivision of Northfield Annex No. 2, would close Nelray Blvd., the street on which appellants' property abuts, since it closes all streets in the Annex. This ordinance, however, should be read and construed with the resubdivision of this Annex made by Staehely on March 6, 1946, for the reason that the ordinance of the City of February 28, 1946, refers to and recites the fact that it was adopted in order that such resubdivision be made, and the plat of this new or resubdivision shows to have been expressly approved by the City Engineer and the City Plan Commission of Austin.

Under this view, appellants' property does not abut upon any street vacated, abandoned or closed by the City.

The constitutionality of Art. 4646a was sustained in Kahn *v.* City of Houston, 48 S. W. 2d 595 (Com. App.).

In the emergency clause, appended to the above statute, the legislature took note of the uncertainty created by court decisions in this class of suits. The court in the Kahn case referred to Bowers *v.* City of Taylor, 24 S. W. 2d 816 (Com.

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App.), where injunctive relief was permitted under a state of facts somewhat similar to those presented in the Kahn case, which were there held insufficient to authorize injunctive relief.

It is thus apparent that Art. 4646a has brought about a change in the law as announced in decisions prior to the enactment of this statute.

We, therefore, deem it inappropriate to consume time and space in analyzing all of the decisions cited by the parties which were rendered before the passage of Art. 4646a.

Art. 4646a was first cited by our courts in Sigel *v.* Buccaneer Hotel Co., 40 S. W. 2d 168 (Ct. Civ. App. Writ. Ref.). Appellant in that case was an abutting owner. He sought a mandatory injunction against the Hotel and the City of Galveston, alleging the unlawful obstruction and closing of a street. In holding that the injunction was properly denied by the court, after stating that appellant must show special damage not suffered by the general public, made the following reference to Art. 4646a:

> "In addition to this, the Legislature of this state has limited the right of citizens to maintain a suit of this kind to 'the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed.' Acts 41st Legislature (Fifth Called Session), Chapter 84, page 257 (Vernon's Ann. Civ. St., Art. 4646a).
>
> "Whether or not this statute applies to this case in which the act complained of occurred prior to the enactment of the statute, it is an emphatic endorsement by the Legislature of the rule of decision above mentioned."

This Article was next held valid in the Kahn case, supra. In this case the injunction was sought not only against the City of Houston but also against two railroad companies to restrain them from closing and appropriating certain streets. Injunction was denied.

Art. 4646a was next cited in Hartwell Iron Works *v.* M. K. & T. Railway, 56 S. W. 2d 922 (Ct. Civ. App.). Injunction

against closing street was denied, the court relying, in part, upon the decision in the Kahn case and this Article. It is noteworthy that only private concerns were parties to this suit.

The last case citing Art. 4646a is Roberts *v.* Shell Pipe Line Corp., 175 S. W. 2d 106 (Ct. Civ. App.). An ordinance passed by the City Council of Colorado City closed certain streets. A mandatory injunction was sought to compel the pipe line company to remove certain fences built across this street. The injunction was denied under the authority of Art. 4646a. The City of Colorado was not a party to this suit.

These cases demonstrate that the denial of injunctive relief under this statute is not limited to the City, as appellants contend, but extends as well to private persons who proceed under and by virtue of the ordinance closing or vacating streets. Very little would have been accomplished by the Legislature if the statute denied such relief against the City alone. The evil to be remedied would still exist. The street, closed by ordinance, would be open to all but the City. The language of this statute is not susceptibel of this construction.

The following cases, decided after the enactment of Art. 4646a, are cited by appellants in support of their claim to injunctive relief:

Griffith et al *v.* Allison et al., 60 S.W. 2d 899, which was reversed and rendered by the Supreme Court, 96 S.W. 2d 74.

Miller et al. *v.* Dallas County et al., 71 S.W. 2d 377 (Ct. Civ. App. Writ Ref.).

Duggan *v.* Buckner et al., 155 S.W. 2d 661 (Ct. Civ. App. Writ Ref. W.O.M.).

Eidelbach et al. *v.* Davis et al., 99 S.W. 2d 1067 (Ct. Civ. App. Writ. Dis.).

These cases are distinguishable on many grounds but it is sufficient to say that in none of these cases was Art. 4646a relied upon or cited by the court and that in none of these cases was a city ordinance closing a street involved, except that in Miller *v.* Dallas County the City of Dallas executed an acquittance of its rights. The land and streets lay outside the City of Dallas and the court held that Dallas

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County alone was authorized to assert jurisdiction for highway purposes.

An injunction against Staehely enjoining acts under his revocation would be useless since the same acts could be lawfully performed under the City ordinance and the resubdivision. Courts of equity do not issue writs of injunction under such circumstances.

Appellants have shown no right to the relief sought and, appellants declining to amend, the trial court properly dismissed their suit.

The judgment of the trial court is affirmed.

(S.) R. G. HUGHES,
*Associate Justice.*

Affirmed.

Filed: October 8, 1947.

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## APPENDIX "B"

### Court Rules

*Texas Rules of Practice and Procedure in Civil Actions*

*Rule 458. Motion for Rehearing*—Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, within fifteen days after the date of rendition of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, whether such date be in the same or a succeeding term of said court, file with the clerk of said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so he shall accompany his motion with, or furnish to the clerk on

his request, a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 460. Failure to supply such copies on request of the clerk may result in a dismissal of the motion.

*Rule 468. Filing of Application for Writ of Error.*—The application shall be filed with the clerk of the Court of Civil Appeals within thirty days after the overruling of the motion for rehearing, provided, when the thirtieth day falls on Sunday or a legal holiday the petition may be filed on the next day following which is neither a Sunday nor a legal holiday.

*Rule 472. Forwarded to Supreme Court.*—When an application for a writ of error to the Supreme Court is filed with the clerk of a Court of Civil Appeals, he shall note upon his record the filing of said petition, and promptly forward the same to the clerk of the Supreme Court with the original record in the case and the opinion of the Court of Civil Appeals, the motion filed therein, certified copies of the judgment and orders of the Court of Civil Appeals, and a copy of the appeal or the supersedeas bond of the appellant.

*Rule 473. Petition with Record.*—The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs of suit.

*Rule 484. Where Application Dismissed or Refused.*—When the application shall have been filed for a period of ten days, if the court determines to refuse or dismiss the same, whether the respondent has answered or not, the clerk of the court will retain the application, together with the transcript and accompanying papers, for fifteen days from the date of rendition of the judgment refusing or dismissing the writ. At the end of that time, if no motion for rehearing

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has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of the Supreme Court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders denying or dismissing such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the application for writ of error.

*Rule 515. Motion for Rehearing.*—A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court, and not later; provided, however, that the court in cases of emergency where the ends of justice require it, may deny the right to file such motion. The grounds relied upon for the rehearing shall be distinctly specified in the motion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion.

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CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 700

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F. S. GAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

*Appellees.*

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APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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## STATEMENT OF CHALK HILL THEATRE COMPANY, LTD., OPPOSING JURISDICTION ON APPEAL

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ARTHUR P. BAGBY,
*Counsel for Appellee,*
CHALK HILL THEATRE COMPANY, LTD.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

# No. 700

F. S. CAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

*Appellees.*

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

## STATEMENT OPPOSING JURISDICTION ON APPEAL

Pursuant to the terms of Subsection 3, of Rule 12, of this Court, Chalk Hill Theatre Company, Ltd., an Appellee, respectfully files this statement opposing jurisdiction on appeal.

### Opinion Below

The only court to write an opinion in this case was the Court of Civil Appeals for the Third Supreme Judicial District of Texas. Its opinion is reported in 205 S. W. (2d) 126.

## Jurisdiction

Appellants claim jurisdiction under Judicial Code, Section 237 (a); 28 U. S. C. A. 344 (a). This Appellee submits, as will appear from the summary of the argument, that no jurisdiction exists because no Federal question is presented by Appellants.

## Statement of the Case

Appellants, as the owners of one lot and the holders of a contract of sale covering a second lot in a subdivision described as "Northfield Annex No. 2" in the City of Austin, Travis County, Texas, instituted this action against Appellees, seeking an injunction restraining the closing of *any* street within such subdivision and from interfering with Appellants use thereof. *The recovery of damages was not sought.*

The Appellee, Walter Staehely, originally subdivided the tract here in question on or about August 1, 1940, filing an appropriate plat of such subdivision in the Office of the County Clerk of Travis County, Texas, as required by law,[1] dedicating the streets shown thereon for "public use as streets." Appellant, F. S. Gambrell, purchased a lot in such subdivision on January 22, 1946, and entered into a contract of sale to purchase a second lot therein on February 15, 1946.

Thereafter, on February 28, 1946, Appellee, Walter Staehely, filed for record in the Office of the County Clerk of Travis County, Texas, an instrument seeking to vacate and annul the plat theretofore filed and on the same day the City Council of the City of Austin passed an ordinance vacating and closing all streets within such subdivision.

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[1] Acts 1927, 40th Legislature of the State of Texas, page 342, Chapter 231; Vernon's Annotated Civil Statutes, Article 974a.

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Subsequently and as a part of the same transaction, on March 6, 1946, the subdivider filed a second plat of such subdivision in the manner required by law.[1]

The second plat was identical with the first plat of such subdivision except there was a change in the course or direction of Guadalupe Street and a vacation of a few lots lying to the West of Guadalupe Street, as relocated. No property lines were changed by the second plat with the exception that the lots lying East of and adjacent to Guadalupe Street, as relocated, were made larger. No change whatever was made respecting the lot owned by the Appellant or the lot contracted to be purchased by them either as to property lines or as to description. Neither of the lots owned by Appellants abuts on any street or alley that was closed or in any manner altered by the second plat. No easement in Guadalupe Street was destroyed by the second plat, the easement in Guadalupe Street being only slightly changed insofar as concerns its course or direction.

Appellee, City of Austin, Texas, is a "home rule city," deriving its authority from Section 5, of Article 11, of the Constitution of the State of Texas. As such, its City Council has plenary powers over its streets. Sections 16, 17 and 18, of Article 1175, *Revised Civil Statutes of Texas, 1925.* Section 1, of Article 13, *Charter of the City of Austin, Texas. City of Dallas* v. *Ingram* (Tex. Civ. App.), 284 S. W. 345, writ refused;[2] *Duvall* v. *City of Dallas* (Tex. Civ. App.) 27 S. W. (2d) 1105, writ refused.

The Court of Civil Appeals denied Appellants injunctive relief, the only relief sought, for each severally of the following reasons: (1) Appellants had an adequate legal

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[2] The refusal by the Supreme Court of Texas of an application for writ of error amounts not only to an approval of the judgment of the Court of Civil Appeals, but to an approval of that Court's opinion. *Hamilton* v. *Empire Gas & Fuel Co.*, 134 Tex. 377; 110 S. W. (2d) 561; *Humble Oil & Refining Co.* v. *State* (Tex. Civ. App.) 158 S. W. (2d) 336, writ refused.

remedy, to-wit: An action for damages; (2) There was no taking of Appellants' property under Section 17, of Article 1, of the Constitution of the State of Texas as there was no physical invasion or appropriation thereof; and (3) Acts 1930, 41st Legislature of the State of Texas, 5th Called Session, Page 257, Chapter 84 (Vernon's Annotated Civil Statutes, Article 4646a) prohibited the issuance of an injunction in cases of this character. In brief, under state law, Appellants were not entitled to injunctive relief—the only relief requested.

The sole question presented by this appeal is the claim by Appellants that they are entitled to injunctive relief by reason of the Fourteenth Amendment to the Constitution of the United States.

## Summary of the Argument

1. No Federal question is presented by appellants' points I and II because no such questions were raised or decided below.

2. No Federal question is presented by appellants' points I and II because the action of the Courts below is supported by a non-Federal ground adequate to sustain it.

## First Point

No Federal question is presented by appellants' points I and II because no such questions were raised or decided below.

## Argument

This suit was instituted by Appellants against Appellees for an injunction restraining Appellees from physically closing any of the streets within the subdivision above mentioned or from interfering with Appellants' use thereof. As respects the claim of Federal jurisdiction, Appellants,

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in their pleading in the trial court, alleged only "To close and vacate said streets will be to deprive these Plaintiffs of valuable property rights and thereby constitute a taking of Plaintiff's property without due process of law" and that the filing of the second plat "has cast upon the title to the property owned by Plaintiffs a cloud which in effect is a taking of Plaintiff's property without due process of law."

Appellants, in their pleadings, did not point specifically or with particularity to any provision of the Constitution of the State of Texas nor the Constitution of the United States deemed by them to have been violated. To the contrary, Appellants did not, by their pleading, seek or request the Court to declare Article 4646a, or any provision thereof, nor the denial of an injunctive remedy under the facts alleged by them, invalid as being repugnant to the organic law of the State of Texas or of the United States.

The brief filed on behalf of Appellants in the Court of Civil Appeals contended only that Article 4646a, as construed by the trial court, was in contravention of Article 1, Section 19, Constitution of the State of Texas. No claim of Federal question was asserted.

The motion for rehearing filed on behalf of Appellants in the Court of Civil Appeals reiterates the contention as respects the provisions of the Constitution of the State of Texas, but is entirely silent as to claim of Federal question.

The application for writ of error filed on behalf of Appellants in the Supreme Court of Texas raised the issue of due process only as respects the Constitution of the State of Texas.

To summarize, in neither their pleadings, their brief in the Court of Civil Appeals, their motion for rehearing in such Court, nor in their application for writ of error

to the Supreme Court of Texas did Appellants complain of any Federal right being violated. It was only in their motion for rehearing on petition for writ of error filed in the Supreme Court of Texas, which petition for rehearing was not entertained by the Supreme Court of Texas, that Appellants for the first time made direct and specific reference to their claim under the Fourteenth Amendment.

In its opinion, the Court of Civil Appeals considered Appellants' claim of invalidity as respects the Constitution of the State of Texas. It is clear that such Court decided no Federal question, none being presented to it for decision. It is equally apparent that the Federal question now claimed was never properly presented to the Supreme Court of Texas except upon motion for rehearing and that Court then refused to consider it.

The long established general rule is that an attempt to raise a Federal question after judgment upon a petition for rehearing comes too late unless the Court actually entertains the question and decides it. *Herndon* v. *State of Georgia,* 295 U. S. 441, 443; *McCorquodale* v. *Texas,* 211 U. S. 432; *El Paso & Southwestern Railway Company* v. *Eichel & Weikel,* 226 U. S. 590; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co,.* 252 U. S. 341, 343,

The mere pleading by Appellants in the trial court that the vacating of such streets constituted a taking of property without due process of law is, of course, insufficient to invoke Federal jurisdiction. It appears well settled that an averment making no reference to the Constitution of the United States and asserting no express right thereunder is solely referable to the state Constitution, which, in this instance, has a due process clause and affords no basis whatever for invoking the jurisdiction of this Court. *Bowe* v. *Scott,* 233 U. S. 658. As this Court has often noted, the failure of Appellants to assert the claim of

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Federal jurisdiction in the State Court is not cured by the allowance of an appeal. *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 343.

To summarize, it is not enough that Appellants could have raised a claim of Federal right; they failed so to do in the manner and time required by the decisions of this Court. This Court is, therefore, without jurisdiction over this appeal. The Judicial Code intended to restrict the obligatory appellate jurisdiction of this Court to a narrow class of cases and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651.

**Second Point**

No Federal question is presented by appellants' points I and II because the action of the Courts below is supported by a non-Federal ground adequate to sustain it.

**Argument**

Under points I and II, Appellants contend that to deny them injunctive relief on any grounds under the facts here presented is to deprive them of their property without due process of law. While this Appellee believes that its judgment is immune to attack against the claim of Federal jurisdiction at this late date, this Appellee, in order that all phases of the case may be considered, presents the following argument addressed to the broad proposition that no substantial Federal question is presented by Appellants.

The due process and equal protection clauses of the Fourteenth Amendment govern state action or action by an agency of the state; they have no application to the action of private individuals. *Nixon* v. *Condon*, 286 U. S. 73, 83. Hence, as respects this Appellee, no colorable claim may be asserted by reason of such amendment.

If by any stretch of the imagination, Appellants' petition for appeal could be construed to allege that the decisions of the courts of Texas are in conflict as to Appellants' private easement, *vel non*, such petition would raise no Federal question. Appellants have no vested interest in the principle of *stare decisis*. The fact that the courts of Texas may have announced law in their case that is different from the law announced in other cases presents no question under the Fourteenth Amendment. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681; *Fleming* v. *Fleming*, 264 U. S. 29, 31; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 450.

Despite the contention of Appellants that they have a private easement over all streets in the subdivision and that to deny injunctive relief to protect such private easement is to deny due process of law under the Fourteenth Amendment, this Court has uniformly held that a litigant has no property in the constitutional sense in any particular form of remedy; all that a litigant is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. It is clearly apparent in this case that the substantial rights, if any, of the Appellants respecting the claim of private easement asserted is adequately preserved by a suit for damages; an effective procedure is not denied to them.

Finally, it is settled by the decisions of this Court that the state courts must ultimately determine the extent, limitations and qualifications of an abutting or non-abutting owner's rights and easements in a street. It was the duty of the state court in this case to ascertain, declare and apply the law of Texas and its determination of that law is conclusive upon this court. *Sauer* v. *City of New York*, 206 U. S. 536.

## Conclusion

It is respectfully submitted that no Federal question was raised or decided below and that the decision of the Courts below is amply supported on non-Federal grounds.

ARTHUR P. BAGBY,
*Counsel for Appellee,*
*Chalk Hill Theatre Company, Ltd.*

(5578)

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 700

---

F. S. GAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

*Appellees*

---

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

---

## STATEMENT OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION AND MOTION TO DISMISS THE APPEAL.

---

Pursuant to Rule 12 of this Court, this Appellee, the City of Austin, states the following matters and grounds against the jurisdiction of this Court as asserted by the Appellants herein, in their statement of the basis of the appellate jurisdiction, filed herein on the 24th day of February, 1948, as required by Rule 12 of the Supreme Court:

I

The validity of a statute of a State has not been questioned on the ground of being repugnant to the Constitution

or laws of the United States and sustained by a State court as against such contention, and the record in this case does not affirmatively show that a State statute has been questioned on such grounds.

Appellants seek to sustain the jurisdiction on the basis that the validity of a statute of the State of Texas, Ch. 84, p. 257, General Laws, Fifth Called Session, 41st Legislature, 1935, being Article 4646a of Vernon's Annotated Civil Statutes, and an ordinance of the City of Austin was questioned as being repugnant to the Constitution of the United States and that this statute and ordinance were upheld by the State court. It is the position of this Appellee that the validity of said statute and ordinance as being contrary to the Constitution of the United States was not questioned in any of the State courts and that this Court is without jurisdiction of the case. Judicial Code, Section 237, amended; Title 28, U. S. C. A., Section 344. And further, the record in this case does not affirmatively show that a Federal question was presented for decision to the highest court of the State having jurisdiction and that the Federal question was actually decided by such court as has been held to be essential to the jurisdiction of this Court in innumerable decisions. *Southwestern Bell Telephone Co.* v. *State of Oklahoma, et al.*, 303 U. S. 206; *Lynch* v. *New York*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474.

A review of the record in this case will clearly demonstrate that no Federal question was timely presented in the courts below and that the record does not affirmatively show that a Federal question was presented, nor does the opinion of the Court of Civil Appeals in any way show that a Federal question was presented. The record will be reviewed in the order in which it was formed.

**Trial Court**

Appellants' petition in the trial court (53rd Judicial District Court of Travis County, Texas) does not expressly or impliedly refer to the statute now questioned. The ordinance is contended to be invalid for the reason that it was passed for a private purpose and not for a public purpose. (See pp. 6, 7, and 8, paragraph VII.) But the Constitution of the United States is not mentioned in the petition. Appellants did allege:

> "To close and vacate said streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law." (p. 6, par. VI)
>
> and
>
> "The said defendant Walter Staehely by filing his purported vacation of the subdivision set out and described above, has cast upon the title to the property owned by the plaintiffs a cloud which in effect is a taking of plaintiffs' property without due process of law." (p. 8, par. IX)

But such allegations are only referable to the ordinance of the City of Austin by implication, and are only referable to the United States Constitution by implication or inference. It is not enough to contend that a statute or ordinance is unconstitutional because such claim, in the absence of anything to indicate the contrary, will be taken as intended to apply to the State constitution and not the Federal Constitution. *Bowe* v. *Scott*, 233 U. S. 658. This case involved an ordinance of the City of Richmond which closed portions of an alley for thirty years. In his bill seeking to enjoin this ordinance the plaintiff alleged "that the ordinance is an attempt to take from your complaints, whose property adjoins and abuts upon the said alley, their rights

in and to said alley without due proces of law." This Court said:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is referable to the state constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. Rep. 176."

Our conclusion is that no Federal question was raised in the trial court nor does the judgment in any way indicate that a Federal question was raised.

**Court of Civil Appeals**

Rule 324,[1] Texas Rules of Civil Procedure, requires ". . . a motion for new trial to be filed as a prerequisite to an appeal in all cases unless the case is tried before the court without a jury . . ." This case was tried before the court without a jury.

Rule 374,[2] Texas Rules of Civil Procedure, provides that the motion for new trial when required to be filed shall constitute the assignments of error on appeal and that a ground of error not set forth in the motion shall be considered as waived and that where no motion for new trial is required any complaint of the action of the court to be relied upon upon appeal must be "included in the statement of points in the brief as hereinafter provided." In their brief in the Court of Civil Appeals the Appellants set forth three points of error.[2] Neither the ordinance nor the statute was

---

[1] Copied in full in Appendix.

[2] Copied in full in Appendix.

questioned in these points of error as being contrary to the Constitution of the United States.

An examination of the points relied upon by Appellants for their motion for rehearing before the Court of Civil Appeals will also show that no Federal question was raised there, and under Rule 374 any contention "if relied upon upon appeal, shall be included in the statement of points in the brief . . ."

**Opinion of the Court of Civil Appeals**

The opinion of the Court of Civil Appeals assumes the ordinance in question to be void—"So, for the purpose of this opinion, we assume the truth of Appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void." Certainly that does not indicate a decision as to the validity of the ordinance in regard to the Federal Constitution. The opinion does uphold the constitutionality of Article 4646a, citing *Kahn* v. *City of Houston*, 121 Tex. 293, 48 S.W. (2d) 595, where this statute was upheld against the contention that it violated the state constitution. The holding that the statute is constitutional certainly cannot be referable to the United States Constitution because, as seen from the points of error relied upon by Appellants in the Court of Civil Appeals, the statute was not questioned on that ground.

**Supreme Court**

Rule 469c,[3] Texas Rules of Civil Procedure, requires that the points of error relied upon in an application for writ of error before the Texas Supreme Court must be saved in the statement of points in the brief before the Court of Civil Appeals, and also assigned as error in the motion for rehearing in the Court of Civil Appeals. A reference to

[3] Copied in full in Appendix.

the points of error in these three instruments (Appellants' Brief in Court of Civil Appeals, Appellants' Motion for Rehearing in Court of Civil Appeals, and Application for Writ of Error to the Supreme Court) readily discloses that the Federal Constitution is not mentioned and that neither the ordinance nor statute here involved is asserted to be contrary to the Federal Constitution.

In each instrument the statute is questioned as being contrary to the Texas Constitution, but in Appellants' Motion for Rehearing before the Supreme Court of Texas for the first time the United States Constitution is mentioned and Appellants contend that Article 4646a is invalid under the due process clause of the United States Constitution as well as the Constitution of Texas. The Texas Supreme Court overruled this motion, but such action was not a decision on the Federal question. Under the Texas practice, as seen by Rules 324, 374, and 469c, the Texas Supreme Court is not authorized to consider a point of error not set out in the motion for rehearing filed in the Court of Civil Appeals and not contained in the application for writ of error. *Moore* v. *Dillworth,* Tex. Sup. Ct., 179 S.W. (2d) 940.

> "Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition."
>
> *Radio Station WOW, Inc., et al.* v. *Johnson,* 326 U. S. 120, and cases cited.

Especially applicable is the following language from *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 857:

> "It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a

challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, (citing cases) and appellant's burden is to show affirmatively that we have jurisdiction." (citing cases)

**Conclusion**

No Federal question was presented in the highest court of the State of Texas to which this case was presented and the record does not affirmatively show that a Federal question was raised or decided by any of the Texas courts.

II

Assuming that the validity of a statute of the State of Texas, Ch. 84, p. 257, General Laws, Fifth Called Session, 41st Legislature, 1935, being Article 4646a of Vernon's Annotated Civil Statutes, was questioned as being repugnant to the Constitution of the United States and that its validity was upheld as against such contention, the decision of the Court of Civil Appeals is also based upon an independent ground involving local and state law which is sufficient to sustain the judgment in this case. The Supreme Court of the United States will not entertain jurisdiction to review a judgment of a state court when that judgment rests upon two grounds, one of which is a Federal ground and the other a state ground which is sufficient to sustain the judgment. *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *Herb* v. *Pitcairn et al.,* 324 U. S. 117; *Flournoy* v. *Wiener,* 321 U. S. 253.

An examination of the opinion of the Court of Civil Appeals in this case will reveal that the decision was based upon two grounds:

First—that Appellants were not entitled to injunctive relief because they had shown no "taking" or other injury; and

**Second—Appellants were denied injunctive relief because of Article 4646a.**

**Even if it is assumed that this second ground decided a Federal question, the first ground mentioned is independent, involves only local law, and is sufficient to sustain the judgment.**

**Article 1, Section 17, of the Constitution of Texas, provides**

> **"No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . . ."**

**It was early held by the Supreme Court of Texas in *McCammon and Lang Lumber Co. et al.* v. *Trinity and B. V. Ry. Co.*, 133 S. W. 247:**

> **"While the Constitution provides that, without consent of the owner, his property shall not be 'taken, damaged or destroyed' without compensation, it further says that, when it is taken, 'compensation shall be first made or secured by a deposit of money'. The distinction is thus made by the Constitution itself between taking and damaging, etc., which becomes important when the aid of equity is invoked to prevent action merely threatened. If such action will constitute a taking, the facts that it is without consent and that compensation has not been made render it unlawful so that the property owner has the right to prevent it by injunction. If it will constitute only a damaging, the attempt is not necessarily unlawful merely because compensation is not made in advance; and, if equity will prevent it at all, it will do so only upon the showing of additional facts. It is unnecessary to discriminate between the street and the alley as the decision will apply to both."**

Appellants asserted in their petition in the trial court and in their briefs before the appellate courts below that through their purchase of a lot in the subdivision with specific reference to and reliance upon the deed of dedication and map or plat of this subdivision, duly filed of record in the office of the County Clerk, acquired an irrevocable easement and property right in all the streets dedicated therein, and that the action of the City of Austin in altering the course of one street and closing portions of other streets in the subdivision (none of which abutted on Appellants' property) constituted a taking of their property without compensation. This Appellee vigorously disputed that contention.

In view of the foregoing constitutional provision, it was necessary for the Court of Civil Appeals in determining whether or not Appellants were entitled to injunctive relief to decide whether the closing of the streets involved amounted to a "taking" or "damaging" of Appellants' property. And in order to decide the latter question, necessarily the court had to determine the nature of the interest in the streets acquired by the Appellants by reason of their purchase of a lot in the subdivision. And the answer to this problem involves the construction of the plat of the subdivision approved by the proper City authorities and filed with the office of the County Clerk by the dedicator and the deed conveying the lot in question to the Appellants.

In stating the legal effect to be given to these instruments, the Court of Civil Appeals said that Appellants acquired vested rights in the streets in the subdivision by reason of their purchase of a lot therein, citing *City of Corsicana* v. *Anderson*, Tex. Civ. App., 78 S. W. 261, writ refused. A reference to that decision will show that the court there held that such a purchase as involved in this case constituted a dedication of the streets and alleys in the subdivision and

entitled such purchasers and the city to prohibit obstructions in the streets by injunction and to compel removal of obstructions in the streets by mandatory injunction. That was the nature of the right acquired by Appellants.

Further, when read in conjunction with the remainder of the opinion, it will be seen that the true holding is summed up in this language:

> "Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants' property, under Art. 1, Sec. 17, of our Constitution, Vernon's Ann. St., is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, Tex. Civ. App., 27 S. W. (2d) 1105, writ refused; Johnson *v.* Lancaster, Tex. Civ. App., 266 S. W. 565; Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. (2d) 595."

The necessary import of this language is that the interest in the streets acquired by Appellants by reason of their purchase with reference to the plat of the subdivision were not of such a nature that their destruction would amount to a taking. Certainly, the construction and legal effect of the plat and deed of dedication of the subdivision and the conveyance to the Appellants is a matter of local law. "The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us." *Central Hanover Bank and Trust Co.* v. *Kelly,* 319 U. S. 94.

The Court of Civil Appeals concluded that there had been no taking and that Appellants had alleged no other injuries and therefore were not entitled to an injunction because of the well settled rule of Texas law that one who is not prejudiced or injured by the enforcement of an act of the Legislature or a city cannot question its validity. *Mallott* v. *City of Brownsville* (Com. App.) 298 S. W. 540.

Appellants motion for rehearing in the Court of Civil Appeals, in their first ground, recognizes this holding of the court.

**Conclusion**

Regardless of the question of the validity of Article 4646a, the decision of the Court of Civil Appeals can be upheld upon the local law that a person who has shown no taking or injury to property is not entitled to equitable relief.

By reason of the foregoing, the City of Austin respectfully moves this Court to dismiss with costs the appeal taken herein to this Court by the Appellants, F. S. Gambrell and Jack Gambrell, because this Court has no jurisdiction as an appellate court to hear and determine said appeal.

Respectfully submitted,

TRUEMAN E. O'QUINN,
ROBERT L. BURNS,
JOE B. ROBERTS,
*Municipal Building,*
*Austin, Texas,*
*Attorneys for Appellee,*
*City of Austin.*

## APPENDIX

### Texas Rules of Civil Procedure

Rule 324. Prerequisites of Appeal.

In all jury cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court or to sue out a writ of error, if the judgment of the court is rendered five days or more before the adjournment of the court for the term, or, if, upon request or for any other reason, the court continues the term so as to cover a period of five days from the rendition of a judgment, a motion for new trial shall be filed. It is the object of this rule to require a motion for new trial to be filed as a prerequisite to an appeal in all cases unless the case is tried before the court without a jury, or a peremptory instruction is given in the case, or the appeal is based upon some error arising after the action of the trial court upon the motion for new trial, or unless there is not full five days' time from the rendition of the judgment to the adjournment of the court for the term. Provided, however, that when the judgment is rendered non obstante veredicto, or notwithstanding the jury finding on one or more special issues, the appellee may complain of any prejudicial error committed against him over his objection on such trial. A motion for new trial shall not be necessary in behalf of appellee, except where he complains of the judgment or a part thereof.

An assignment in a motion for new trial shall not be a necessary prerequisite to the right to complain on appeal of the action of the court in giving an instructed verdict, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto, or in overruling a motion for judgment for appellant on the verdict.

Rule 374. Assignments of Error.

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required, shall be considered as waived.

Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 469. Requisites of Application.

* * * * * * *

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

Points of Error in brief of Appellants, F. S. Gambrell and Jack Gambrell, filed in the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin:

*Point One*

Appellants, through their purchase of Lot 15, Block 1, in the Northfield Annex Number Two Addition, with specific reference to and reliance upon the deed of dedication and map or plat of this subdivision, duly filed of record in the County Clerk's Office, acquired an irrevocable easement and property right in all streets and alleys dedicated therein; and injunctive relief is the proper remedy to prevent a destruction of this irrevocable easement and property right, and the trial court erred in not so holding.

*Point Two*

Article 4646a, Revised Civil Statutes of Texas, as amended has no application to persons other than municipal corporations, and does not prevent injunctive relief where the

municipal corporation has acted solely to further the interests of a private individual; and the trial court erred in not so holding.

*Point Three*

Error of court in not holding that if Article 4646a, R.C.S., is construed to prevent a person who acquires a private easement by purchase of property with specific reference to a dedication and map from securing an injunction to prevent another person from physically closing such easement, then it is in violation of Article I, Sec. 19, Constitution of Texas.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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# No. 700

---

F. S. GAMBRELL, ET AL.,
*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.,
*Appellees.*

---

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

---

## APPELLEE WALTER STAEHELY'S OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM.

JAY H. BROWN,
*Attorney of Record for Appellee Walter Staehely.*

James P. Hart
HART, BROWN & SPARKS,
*Of Counsel.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 700

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F. S. GAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

*Appellees.*

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APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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## APPELLEE WALTER STAEHELY'S OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM.

The appellee Walter Staehely respectfully submits this his opposing statement and motion to dismiss or affirm, as is provided by Rule 12, Paragraph 3, of the Rules of the Supreme Court, and says:

### Preliminary Statement

The facts are undisputed. Those recited in appellants' petition for appeal are not, however, all of the relevant facts, for this is not a case where appellants' property has

been left in a cul de sac by the closing of a street or one where appellants, as abutting owners, have been denied reasonable ingress and egress to their property or otherwise suffered special damage.

Walter Staehely was on February 28, 1946, the owner of all land on both sides of Guadalupe Street, in Northfield Annex No. 2, both as originally platted and as resubdivided. Simultaneously with the vacation of the original plat of Northfield Annex No. 2, a subdivision in the City of Austin, Staehely prepared and presented to the City Plan Commission of the City of Austin an amended plat of Northfield Annex No. 2, which was approved by said Commission on February 28, 1946. The City of Austin is a Home Rule City, having all of the rights, privileges, powers, and immunities conferred upon such a city by Article XI, Section 5, Constitution of Texas, and Article 1175, Revised Civil Statutes of Texas. Acting as such, the City Council of the City of Austin, by an ordinance dated and passed February 28, 1946, vacated the original plat of Northfield Annex No. 2 and vacated, abandoned, and closed all streets, avenues, utility easements, and other public places within said subdivision as originally platted.

By an endorsement on the face of the plat of the resubdivision of Northfield Annex No. 2, this appellee dedicated to public use the streets shown on such plat. By such resubdivision of said Northfield Annex No. 2 and the dedication appearing thereon, no change whatever was made in the location of either Lot No. 14 or Lot No. 15, in Block No. 1, in Northfield Annex No. 2, or in any of the lines of either of such lots, or in the location of the street upon which such lots abut, and each of said lots has the identical location on both plats of said Northfield Annex No. 2.

The resubdivision of Northfield Annex No. 2 has had the effect of changing the course of Guadalupe Street from

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the point of its intersection with the North line of Nelray Boulevard in a Northerly direction, and 55th, 55½, and 56th Streets were shortened somewhat, but neither the appellants nor said Lots Nos. 14 and 15, in Block No. 1, in Northfield Annex No. 2, were otherwise affected.

The position of Nelray Boulevard, both as to width and length, is identical on both the original plat and on the resubdivision of Northfield Annex No. 2. The two lots in question, both as originally platted and as resubdivided, abut on Nelray Boulevard and on no other street or alley.

Any reference to alleys in Northfield Annex No. 2 is erroneous. There are no alleys shown on either of the plats to which reference has been made.

## Summary Statement of Appellee Walter Staehely's Contentions

1. Jurisdiction of the Supreme Court of the United States cannot be sustained in this case on the ground that the decision complained of sustains the validity of a city ordinance, for the ordinance here involved was by the State court assumed to be void, and the holding of that court is not predicated to any extent upon the validity of such ordinance.

2. The Supreme Court of the United States is without jurisdiction to entertain this appeal for the reason that there was not drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

3. The Supreme Court of the United States is without jurisdiction to entertain this appeal, because the record in this case fails affirmatively to show that there was drawn in question in the State court the validity of Article 4646a,

Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

4. The Supreme Court of the United States is without jurisdiction to entertain this appeal, because it does not appear from the record in this case that any Federal question was expressly or necessarily decided by the State court.

5. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas rests upon an adequate and substantial non-Federal ground, to wit, that appellants were not entitled to injunctive relief because of their failure to allege any special damage.

6. No question of a Federal nature is presented by this appeal, because there has not been any "taking" of appellants' property within the meaning of either the Fourteenth Amendment to the Constitution of the United States or Article I, Sections 17 and 19, of the Constitution of Texas.

7. No substantial Federal question is presented by this appeal, because Article 4646a, Revised Civil Statutes of Texas, the validity of which was sustained by the Court of Civil Appeals, merely deprives appellants of the remedy of injunction and does not take from them their right to recover such damages, if any, as they may have sustained.

## I

Jurisdiction of the Supreme Court of the United States cannot be sustained in this case on the ground that the decision complained of sustains the validity of a city ordinance, for the ordinance here involved was by the State court assumed to be void, and the holding of that court is not predicated to any extent upon the validity of such ordinance.

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In their statement as to jurisdiction on appeal, the appellants say:

> "The decision complained of here sustains • • • the validity of a city ordinance."

They point out that an ordinance is to be treated as if it were a statute, which is conceded; but appellants fall into error in saying that the ordinance was found valid. From the opinion of the Court of Civil Appeals, we quote:

> "So, for the purpose of this opinion, we assume the truth of appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void."

It would be surplusage to belabor the point; it simply is not in the case.

II

The Supreme Court of the United States is without jurisdiction to entertain this appeal for the reason that there was not drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

The Supreme Court of the United States is without jurisdiction to entertain this appeal, because the record in this case fails affirmatively to show that there was drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

The Supreme Court of the United States is without jurisdiction to entertain this appeal, because it does not appear from the record in this case that any Federal question was expressly or necessarily decided by the State court.

Citation of authority is hardly necessary in support of the proposition that it is essential to the jurisdiction of the

Supreme Court on appeal that there has been an explicit and timely insistence in the State court that a State statute, as applied, is repugnant to the Federal constitution. *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 65 Sup. Ct. 624 (1945); *Citizens National Bank* v. *Durr*, 257 U. S. 99, 42 Sup. Ct. 15 (1921); *Wall* v. *Chesapeake & O. R. R.*, 256 U. S. 125, 41 Sup. Ct. 402 (1921). A Federal question is not to be considered when it has not been raised in the State court or considered there. *Wilson* v. *Cook*, 327 U. S. 474, 66 Sup. Ct. 663 (1946); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 Sup. Ct. 857 (1942); *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 57 Sup. Ct. 466 (1937).

It is clearly demonstrable that appellants have not set up the essential Federal question in the State court at a proper time or in a proper manner. It is equally clear that no such question was presented to or decided by the courts of Texas. Brief references to the record will sustain both of those assertions.

There are but two allegations in appellants' pleadings in which reference is made to a taking of their property without due process of law. We quote each of them below:

> From paragraph VI: "To close and vacate said streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law."
>
> From paragraph IX: "The said defendant Walter Staehely by filing his purported vacation of the subdivision set out and described above, has cast upon the title to the property owned by plaintiffs a cloud which in effect is a taking of plaintiffs' property without due process of law."

Their pleadings are bare of any mention of the Fourteenth Amendment to the Constitution of the United States.

This case having been tried before the court without the

intervention of a jury, no motion for a new trial was required to be filed. Rule 324, Texas Rules of Civil Procedure. That being true, Rule 374, Texas Rules of Civil Procedure, was applicable. It provides that "Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary."

Had appellants wished to complain of the action of the trial court on the ground that they have been deprived of the rights guaranteed them by the Fourteenth Amendment they were free to include such complaint in their brief on appeal. That they wholly failed to do, but they did assert, as their Point Three, the following proposition:

> "Error of the court in not holding that if Article 4646a, R. C. S., is construed to prevent a person who acquires a private easement by purchase of property with specific reference to a dedication and map from securing an injunction to prevent another person from physically closing such easement, then it is in violation of Article I, Sec. 19, Constitution of Texas."

After the Court of Civil Appeals had affirmed the trial court's judgment, appellants filed their motion for rehearing, in which error was assigned as to the failure of the Court of Civil Appeals to sustain the above quoted Point Three.

Appellants' motion for rehearing having been overruled by the Court of Civil Appeals, they applied to the Supreme Court of Texas for a writ of error and in such application urged as their Point Four the following:

> "The Court of Civil Appeals erred in holding, in effect, that Article 4646a, V. A. C. S., does not violate

> Article 1, Secs. 17 and 19, Constitution of Texas, even if it is construed to prevent injunctive relief as a protection against the destruction of vested private property rights without compensation to the owner."

That application was also overruled in due time, and the judgment herein became final.

*At no stage of the proceedings, up to and including the denial of appellants' application for a writ of error, was there any mention made by them of the Fourteenth Amendment to the Constitution of the United States, either expressly or by implication.* Reliance was had solely on Article I, Secs. 17 and 19, Constitution of Texas. Insofar as is here material, those sections of the Texas Constitution provide:

> "Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . ."
>
> "Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

*It should be emphasized that these provisions of the Constitution of Texas are substantially equivalent to the like guarantees contained in the Constitution of the United States.*

Only the effect of the Constitution of Texas was considered by the Texas courts. Their rulings are final in this case, for, as aptly stated by Mr. Chief Justice Fuller, in *Miller* v. *Cornwall R. R.*, 168 U. S. 131, 18 Sup. Ct. 34 (1897), "We have no jurisdiction on a writ of error to a state

court to declare a state law void on account of its collision with a state constitution."

Decisive of the instant case is *Bowe* v. *Scott*, 233 U. S. 658, 34 Sup. Ct. 769 (1914), in which the facts were substantially identical to those now before the court. Shafer, a common source proprietor, had dedicated an alley to public use. Plaintiffs and defendants owned property abutting on that alley. Pursuant to authority conferred upon them by an ordinance of the City of Richmond, defendants closed that part of the alley abutting their property. An injunction was sought to restrain the enforcement of the ordinance and to prevent the defendants from obstructing passage through the alley. A demurrer was sustained on the ground, among others, that plaintiffs did not allege any special damage. The writ of error was dismissed by the Supreme Court. The holding will sufficiently appear from the following quotation from Mr. Chief Justice White's opinion:

> "The other passage in the bill is found in subdivision 'c' of the tenth paragraph, and is as follows: 'That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to said alley without due process of law.' But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 42 L. Ed. 409, 18 Sup. Ct. Rep. 34; *Harding* v. *Illinois*, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. Rep. 176.
>
> "As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court, since such claims are so wholly unsubstantial and frivolous as to be devoid of any merit, it

follows that we have not jurisdiction, and the writ of error must be dismissed."

That case has been cited as authority in the following *per curiam* opinions of the Supreme Court: *Missouri* v. *Geiger*, 235 U. S. 694, 35 Sup. Ct. 208 (1914); *Caldwell* v. *Bauer*, 238 U. S. 607, 35 Sup. Ct. 602 (1914); *O'Brien* v. *Public Service Commission*, 251 U. S. 537, 40 Sup. Ct. 55 (1919); *Armour & Co.* v. *New York, New Haven & Hartford R. R.*, 250 U. S. 651, 40 Sup. Ct. 12 (1919); and *American Trust Co.* v. *McNinch*, 261 U. S. 606, 43 Sup. Ct. 363 (1922).

It will be recalled that here appellants at no time prior to filing their motion for rehearing in the Supreme Court of Texas directed the attention of the state courts to the Constitution of the United States or any portion of the same. But even a general allegation such as "This proceeding is in violation of the Constitution of the United States" would have been unavailing. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 22 Sup. Ct. 120 (1901), followed in *Harding* v. *Illinois*, 196 U. S. 78, 25 Sup. Ct. 176 (1904).

The foregoing authorities appear to be conclusive, but it may be advisable to advert briefly to two more grounds upon which this appeal should be dismissed for want of jurisdiction.

In their petition for appeal appellants quote from their motion for rehearing filed in the Supreme Court of Texas after their application for a writ of error had been overruled. *For the first time during the trial and the appeal of this case the Constitution of the United States was mentioned.* We submit that, for two reasons, appellants' case is not aided by the allegations so made originally in that motion.

In the first place, the motion for rehearing filed in the Texas Supreme Court is not a part of the record on this appeal, because appellants did not request its inclusion

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therein. In view of the familiar rule that jurisdiction of the Supreme Court of the United States is to be determined from the record, *Henneford* v. *Northern R. R.*, 303 U. S. 17, 58 Sup. Ct. 415 (1938), this case stands for decision as if no such motion for rehearing had ever been filed.

Secondly, even if the motion in question were a part of the record, appellants' case would not be helped. That is true because jurisdiction of the Supreme Court cannot be invoked by the assertion for the first time of a Federal question in such a motion for rehearing. Such was the express holding of the court in *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475 (1945), where it was said:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition."

Similar language is found in these additional cases:

*Herndon* v. *Georgia*, 295 U. S. 441, 55 Sup. Ct. 794 (1935):

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

*Citizens National Bank* v. *Durr*, 257 U. S. 99, 42 Sup. Ct. 15 (1921):

> "After the final decision, in an application to the Supreme Court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered

the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this court."

*Wall* v. *Chesapeake & O. Ry.*, 256 U. S. 125, 41 Sup. Ct. 402 (1921):

"Our jurisdiction is invoked upon the theory that validity of the amending act was challenged below because of conflict with the federal Constitution. But the point was not raised prior to the petition to the Supreme Court for a rehearing which was overruled without more. 290 Ill. 227, 125 N. E. 20. It could have been presented earlier. According to the well-established rule we may not now consider it, and the writ of error must be dismissed. Godchaux Co. *v.* Estopinal, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. 213."

Such is our case. Not until they filed their motion for a rehearing in the Supreme Court of Texas did appellants draw in question the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States. The Supreme Court of Texas simply overruled the motion for rehearing, without more. The Federal question was raised too late; the Supreme Court is without jurisdiction to consider it on this appeal.

III

The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas rests upon an adequate and substantial non-Federal ground, to wit, that appellants were not entitled to injunctive relief because of their failure to allege any special damage.

This is not a case, as appellants seek to imply, where *legal* relief has been denied for the invasion of their property rights. It is a case where both the trial court and the

Court of Civil Appeals has said that appellants are not entitled to *equitable* relief, and the Supreme Court of Texas has declined to take jurisdiction. Appellants have a remedy *at law*, if they have sustained damage; they do not have a remedy *in equity*.

Even if it be conceded that persons may acquire private easements in a street, either by virtue of their status as abutting owners or by reason of having purchased property with reference to a map or plat, the nature of the easement is the same, whether the owner thereof is an abutting owner or whether his purchase has been made from a common source proprietor with respect to a map or plat. *If there were a distinction to be made, it would have to be conceded that an abutting owner has greater rights to be protected than a remote owner who may have bought his property with reference to a map or plat.*

It was assumed by the Court of Civil Appeals, and we shall assume, that the ordinance of the City of Austin vacating, abandoning, and closing certain streets in Northfield Annex No. 2 was void. But the invalidity of an ordinance is not, in and of itself, sufficient to warrant the issuance of a writ of injunction. There must be an allegation, as well as proof, of special damage or injury. Such is one of the holdings of the Court of Civil Appeals, in support of which *Malott* v. *City of Brownsville*, 298 S. W. 540 (Tex. Com. App., 1927), was cited.

There Malott, an abutting property owner, sought to prevent by injunction the erection of a bridge across the Rio Grande River in such a manner as to obstruct the street upon which his property was located and asserted the invalidity of the city ordinance by virtue of which the street was being obstructed and the bridge was being erected. The court held:

> "It is unnecesary for us to pass upon the interesting question of the validity of the ordinance under which

defendant in error Creager proposes to erect the structures complained of. If it be true, as found by the Court of Civil Appeals, that plaintiff in error has shown no probable injury from the threatened structures, then clearly he is in no event entitled to an injunction. The law is very clear on this point. An injunction will never be granted unless it appears that injury will otherwise result to the applicant. Chisolm *v.* Adams, 71 Tex. 678, 10 S. W. 336. So that, if it be conceded the ordinance is void, nevertheless plaintiff in error must go further, and show that he is threatened with an irreparable injury by its attempted enforcement before he can possibly be entitled to the relief sought. Pac. Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

"In Boise, etc., Co. *v.* Boise City, 213 U. S. 276, 29 S. Ct. 426, 53 L. Ed. 796, the object of the bill was to obtain an injunction against the enforcement of an ordinance of the city. The Supreme Court, in denying the relief sought, said:

" 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.'

"Authorities to this effect abound wherever the principles of equity are administered. Such courts will never do a useless thing, and the excuse for resorting to the principles of equity at all is to supply a remedy for the prevention of an injury or wrong for which the law affords no adequate remedy.

"To warrant a recovery in a case like this, it must appear that the complainant has suffered, or will suffer, some special damage. The fact that the ordinance is void, if it is void, is not sufficient ground for enjoining its enforcement. Other circumstances bringing the case

> under some recognized head of equity jurisdiction must be shown. 32 C. J. p. 265, sec. 415."

It is true that in that case the court denied equitable relief, because plaintiff had failed to *prove* the special damage so "amply pleaded", but the principles announced in that decision are equally applicable where, as here, the appellants have failed to *plead* any special damage. To have been entitled to the remedy of injunction, they would have been obliged to allege that they were threatened with an irreparable injury by the enforcement of the ordinance vacating and closing the streets in question. Under the undisputed facts in this case, it is manifest that appellants have not and could not have made any such charge.

The only difference between the *Malott* case and the instant case is that there the complainant did not *prove* his right to injunctive relief; here such right is not *pleaded*. As said by the Court of Civil Appeals in its opinion, "Not only do appellants fail to allege any damage, general or special, they expressly decline to do so because the damages would be 'incapable of definite ascertainment.' It follows that the petition for injunction is not aided by the allegation that the ordinance is invalid."

The question, therefore, is one that has been resolved upon the ground that appellants' pleadings are not sufficient to entitle them to the relief for which they pray. Such a procedural matter is one for determination by the courts of Texas. That being an adequate and substantial ground for the holding of the Court of Civil Appeals, the Supreme Court of the United States should, under its well-established rule, either affirm or dismiss the appeal. *Honeyman* v. *Hannan*, 302 U. S. 375, 58 Sup. Ct. 273 (1937), wherein the court expressly held that "The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted

or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

## IV

No question of a Federal nature is presented by this appeal, because there has not been any "taking" of appellants' property within the meaning of either the Fourteenth Amendment to the Constitution of the United States or Article I, Sections 17 and 19, of the Constitution of Texas.

No substantial federal question is presented by this appeal, because Article 4646a, Revised Civil Statutes of Texas, the validity of which was sustained by the Court of Civil Appeals, merely deprives appellants of the remedy of injunction and does not take from them their right to recover such damages, if any, as they may have sustained.

For the purposes of this statement, it may be assumed that appellants had acquired a private easement in the streets that were vacated, abandoned, and closed by the City of Austin and simultaneously relocated in such a way as not to interfere in any respect with the appellants or their property. While it is inconceivable that, under the undisputed facts, appellants can have been damaged to any extent, if it be conceded that they have sustained damages, what is their remedy for the assumed impairment of their private easement?

Prior to the enactment of Article 4646a, Revised Civil Statutes of Texas, the Texas decisions on the subject were far from harmonious. Appellants have cited cases which hold that injunction is a proper remedy in a case of this sort. Upon analysis, however, it will be found that in each of those cases the party granted *equitable* relief was either (1) an abutting owner or (2) showed some special damage

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not suffered by the public in general or (3) was able to prove that ingress and egress to his own property was less convenient.

From the opinion of the Court of Civil Appeals, we quote:

> "Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants' property, under Art. 1, Sec. 17, of our Constitution, is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, 27 S. W. (2d) 1105 (Ct. Civ. App. Writ Ref.); Johnson *v.* Lancaster, 266 S. W. 565 (Ct. Civ. App.); Kahn *v.* City of Houston, 48 S. W. (2d) 595 (Com. of App.)."

There can be no federal question in this case unless, under the undisputed facts shown by the record, there has been a "taking" within the purview of the pertinent constitutional provisions. The appellants have assumed that there has been a "taking" in this case. They have failed to distinguish between a "taking" and a "damaging." That distinction was made by the Supreme Court of Texas at an early date.

We refer to the case of *McCammon Lumber Co.* v. *Trinity & B. V. Ry.*, 104 Tex. 8, 133 S. W. 247 (1911). In that case the plaintiffs, as abutting owners, had fee simple title to certain land over which the street ran and sought to restrain the construction of a railroad track over the same. They contended that the proposed use of the street would amount to a taking of their property without compensation first being paid. The court said that the case necessarily turned on the question of whether or not there was a threatened taking and made this distinction:

> "If such action will constitute a taking, the facts that it is without consent and that compensation has not been made render it unlawful, so that the property owner has the right to prevent it by injunction. If it will constitute only a damaging, the attempt is not

necessarily unlawful merely because compensation is not made in advance, and if equity will prevent it at all, it will do so only upon the showing of additional facts."

The distinction stated was recognized and applied in *Stevens* v. *City of Dublin*, 169 S. W. 188 (Ft. Worth Civ. App., 1914), in which the facts were quite similar to those before the court in the case at bar. The City of Dublin had passed an ordinance authorizing the school district to close a portion of College Street which extended between two blocks of land owned and used by the school district. It appeared that, while plaintiff's property did not abut on College Street, *he had purchased his land with reference to a map or plat showing College Street.* The court squarely *held* at page 190, that "where the complaining party owns property abutting on the street, but not upon that portion closed, the owner is remitted to an action for his damages, if any, as was held by the court below."

To the same effect are *Johnson* v. *Lancaster*, 266 S. W. 565 (Austin Civ. App., 1924), and *Duvall* v. *City of Dallas*, 27 S. W. (2d) 1105 (Dallas Civ. App., 1930).

Even since the passage of Article 4646a, Revised Civil Statutes of Texas, but without reference thereto, the Eastland Court of Civil Appeals has reached the same conclusion in *Shelton* v. *City of Abilene*, 80 S. W. (2d) 351 (Eastland Civ. App., 1935). The plaintiffs in that case had bought their property with reference to a map or plat of the City of Abilene, and they sought to enjoin the construction of an underpass, the effect of which would be to close one of the streets shown on such plat. The court *held* that where a party's only interest in land is that of a servitude, he is restricted to an action at law for damages and is not entitled to injunctive relief.

The City of Austin is a Home Rule City. As such, it has

"exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways, and boulevards," Article 1175(16), Revised Civil Statutes of Texas, and is empowered "to narrow, alter, widen or straighten any such streets, alleys, avenues, or boulevards, and to vacate and abandon and close any such streets, alleys, avenues or boulevards." Article 1175(18), Revised Civil Statutes of Texas. The appellants here contend that by virtue of their purchase of certain lots by reference to a recorded plat, they acquired a right in every street in Northfield Annex No. 2 dedicated to the public, and that they cannot be deprived of such right without their consent. To say the least, the right thus asserted is a broad one. The plat of Northfield Annex No. 2 contains 85 lots, and if the owner of each lot has acquired the right asserted by the appellants, then the authority conferred upon the City of Austin to close, vacate, and abandon streets is barren. The absurdity of appellants' claim is even more apparent when it is remembered that they do not abut upon the vacated portions of Guadalupe Street, or 55th, 55½, or 56th Streets, and have ample means of access to their property by the only street upon which their lots do abut.

As the court judicially knows, there are many cities and towns in Texas, especially in the Western portion of the State, where maps or plats of the entire corporate area were filed many years ago, and all subsequent sales and purchases have been made with reference to such maps or plats. What of those cities and towns? Can any property owner, even though he has sustained no special damage, harass the governing bodies by suits for injunction every time the course of a street is changed, or an alley is closed, or an underpass is constructed, or a park larger in size than a city block is proposed? To ask the question is to

answer it. *Courts of equity do not so hamper or impede progress by the issuance of writs at the behest of those who are only mischievous and who have not been damaged, irreparably or otherwise.*

Because no citizen has, or should have, the right to interfere with the planning and development of streets by governing bodies of cities in this State, the Legislature has seen fit to provide that the remedy of injunction is not available to restrain the vacation, abandonment, or closing of a city street. Article 4646a, Revised Statutes of Texas, was enacted in 1930 and is quoted below:

> "No injunction shall be granted to stay or prevent the vacating, abandonment, or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city.
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> "Sec. 2. Provided that any person, who under existing laws has the right to enjoin a city from vacating, abandoning or closing any street or alley of such city and whose right to such injunction is denied by this Act, shall have the right to an action for damages for any injury that he may sustain by reason of the vacating, abandoning or closing of any street or alley by such city."

The effect of this law was considered by the Commission of Appeals of Texas in *Kahn* v. *City of Houston,* 48 S. W. (2d) 595 (Tex. Com. App., 1932). In an opinion adopted by the Supreme Court, it was said, at page 599, that "the holders of such private rights and easements still have their remedy, either by injunction, if an abutting owner;

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if not, for damages, as may be proper. The import of the decision in that case is stated by the writer of the article "Streets" in 39 Tex. Jur. 539, sec. 22, in this language:

> "Such persons (having private easements) still have their remedy by injunction, if abutting owners, or if not, for damages"

The appellants will doubtless argue that the *Kahn* case is not parallel to the case at bar, inasmuch as it does not appear from the report of that case that Kahn purchased his property with reference to any map or plat of any subdivision. We submit that such a position is untenable, for, as an abutting owner, Kahn had acquired the same right to a private easement that he would have acquired by virtue of a purchase made with reference to a map or plat.

*Roberts* v. *Shell Pipe Line Corp.*, 175 S. W. (2d) 106 (Waco Civ. App., 1943), is precisely parallel to the case here before the court. There the City of Colorado City had passed an ordinance finding "that the best interest of the City requires that (Watson Street) be closed to public traffic." Thereafter, the City executed quitclaim deeds to the area formerly included within such street. Shell Pipe Line Corporation acquired title thereto, and erected a fence across Watson Street. The City did not physically close the street and had no intention of so doing. The plaintiffs, claiming to be the owners of a private easement in the street that had been closed by virtue of being abutting landowners, sought a mandatory injunction commanding the City, Mitchell County, and Shell Pipe Line Corporation to reopen and maintain Watson Street as a public street.

The trial court denied injunctive relief, and such action was sustained upon appeal. Four grounds for affirming

the judgment of the court below are set out in the opinion, but only two of them are material here. We quote:

> "It is clear to us that appellants are not entitled to injunctive relief. (1) Article 4646a, Vernon's Annotated Revised Civil Statutes, provides in part: 'No injunction shall be granted to stay or prevent the vacating, abandonment, or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed * * *' Does the evidence show without dispute that the Shell Pipe Line Corporation built a fence across Watson Avenue at a point where plaintiffs' land actually abuts that part of Watson Avenue actually vacated, abandoned and closed? We think not." (p. 107)
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> "Moreover, it is well settled that ' * * * if there be available an adequate remedy at law in damages, equity will not intervene by injunctive relief.' Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. 2d 595, 599. See also Duvall *v.* City of Dallas, Texas Civ. App., 27 S. W. 2d 1105, writ ref." (p. 108)

On this branch of the case the Court of Civil Appeals has held only that Article 4646a, Revised Civil Statutes of Texas, forecloses a complainant from equitable relief as against the closing of a city street. Such a ruling deals with the equitable remedy alone. Appellants have not been deprived of their right to a ruling by a court of law upon their asserted cause of action. The question is one of procedure, and, as such, the courts of Texas are empowered to determine the proper procedure in a case of this character so long as appellants are not denied an opportunity to be heard.

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The constitutional guaranties of due process of law do not require that parties shall be entitled to any particular form of action or any particular method of procedure for the protection of rights or the redress of wrongs. The holdings of the Supreme Court of the United States to that effect are uniform. For example, in *Gibbes* v. *Zimmerman*, 290 U. S. 326, 54 Sup. Ct. 140 (1933), we find this language:

> "The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference, the appellant has no property in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

To the same effect is *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389, 16 Sup. Ct. 344 (1896), where it is said:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what legal process rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action, instead of by another."

See, also, *Hardware Dealers Mutual Fire Co.* v. *Glidden Co.*, 284 U. S. 151, 52 Sup. Ct. 69 (1931), where it is said "the procedure by which rights may be enforced and wrongs remedies is peculiarly a subject of State regulation and

control. * * * In the exercise of that power and to satisfy the public need, a State may choose the remedy best adapted in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

The Legislature of Texas has, in the exercise of its judgment, seen fit to deprive its citizens of the remedy of injunction for the prevention of the closing of city streets. Individual interests have been subordinated to the public good. We submit that the statute represents a proper exercise of the police power, for persons damaged by the closing of a street still have their remedy for the collection of such damages as they may have sustained by an action at law. No rights have been taken from them; they have been denied only the equitable remedy of injunction.

**Prayer**

Wherefore, the appellee Walter Staehely respectfully prays that the appeal be dismissed or that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas be affirmed upon this motion.

JAY H. BROWN,
*Attorney of Record for*
*Appellee Walter Stachely.*

HART, BROWN & SPARKS,
*Of Counsel.*

No. 700. GAMBRELL ET AL. *v.* CHALK HILL THEATRE CO., LTD. ET AL. Appeal from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. *Everett L. Looney* for appellants. *Arthur P. Bagby* for the Chalk Hill Theatre Co., Ltd.; *James H. Hart* for the City of Austin; and *James P. Hart* for Staehely, appellees. Reported below: 205 S. W. 2d 126.